

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of</b>	)	
<b>Columbus Southern Power Company and</b>	)	<b>Case No. 11-346-EL-SSO</b>
<b>Ohio Power Company for Authority to</b>	)	<b>Case No. 11-348-EL-SSO</b>
<b>Establish a Standard Service Offer</b>	)	
<b>Pursuant to § 4928.143, Ohio Rev. Code,</b>	)	
<b>in the Form of an Electric Security Plan.</b>	)	
<b>In the Matter of the Application of</b>	)	
<b>Columbus Southern Power Company and</b>	)	<b>Case No. 11-349-EL-AAM</b>
<b>Ohio Power Company for Approval of</b>	)	<b>Case No. 11-350-EL-AAM</b>
<b>Certain Accounting Authority.</b>	)	

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**OHIO POWER COMPANY’S MEMORANDUM CONTRA  
SEPTEMBER 28, 2012 MOTION TO STRIKE BY  
THE OFFICE OF THE CONSUMERS’ COUNSEL AND  
THE APPALACHIAN PEASE AND JUSTICE NETWORK**

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On September 28, 2012, The Office of the Ohio Consumers’ Counsel (“OCC”) and the Appalachian Peace and Justice Network (“APJN”) moved to strike portions of Ohio Power Company’s (“AEP Ohio”) Application for Rehearing, filed on September 7, 2012, and its Memorandum Contra the applications for rehearing submitted by a number of intervenors, which the Company filed on September, 17, 2012. For the reasons provided below, the motion to strike should be denied.

As an initial matter, AEP Ohio submits that OCC/APJN should be estopped from moving to strike any of the arguments that AEP Ohio made in its September 7, 2012 Application for Rehearing. OCC/APJN filed a Memorandum Contra to AEP Ohio’s Application for Rehearing on September 17, 2012. Nowhere in that Memorandum Contra , however, did OCC/APJN assert that AEP Ohio’s citation to the Commission’s orders approving stipulations entered into in AEP

Ohio's distribution rate cases or Duke Energy Ohio's 2008 and 2011 ESP cases was improper. Accordingly, OCC/APJN have waived any objection to AEP Ohio's citation to those orders in its Application for Rehearing. Further, under the Commission's procedural rules, a party only gets one shot at opposing rehearing application and that is through a timely-filed memorandum in opposition. OCC's motion to strike flouts the Commission's process and attempts to take a second bite at the apple.

Moreover, OCC's argument is based on a false premise that Commission orders adopting Stipulations can never be cited for any purpose other than enforcement. As the Commission recently clarified in this very proceeding:

We acknowledge that individual components agreed to by parties in one proceeding should not be binding on the parties in other proceedings, but we find that references to other stipulations in this proceeding were limited in scope and did not create any prejudicial impact on parties that signed the stipulations. Consistent with our Finding and Order in Case No. 11-5333-EL-UNC, we also note that, while parties may agree not to be bound by the provisions contained within a stipulation, these limitations do not extend to the Commission.

*ESP II*, Opinion and Order at 10. Thus, the Commission has already rejected OCC/APJN's overbroad premise and should do so again by denying the motion to strike.

Finally, none of the AEP Ohio stipulation references attacked by OCC in its motion to strike attempted to preclude or limit signatories from advocating any position they may choose to advocate in this case. Rather, the Commission's orders are referenced for legitimate purposes, more fully discussed below, such as showing that outcomes advocated by AEP Ohio in this case are similar to outcomes reached in other (stipulated) cases and, thus, neither violate regulatory principles nor are unlawful. The OCC/APJN motion to strike is without merit and should be denied.

**A. The Appropriate ROE to Use in Establishing the RSR Revenue Target.**

In the course of calculating the revenue target for the RSR, the Commission utilized a 9 percent return on equity (“ROE”) value for AEP Ohio. August 8, 2012 Opinion and Order at 35. In its Application for Rehearing, at 21-22, AEP Ohio provided several reasons that supported its position that a 9 percent ROE value is too low, and that the Commission should, instead, use the 10.5 percent value that AEP Ohio witness Allen recommended. The Company pointed out that in a nearly contemporaneous decision on July 2, 2012, in Case No. 10-2929-EL-UNC, the Commission, at 34, found that the appropriate ROE to use in establishing generation capacity prices is 11.15 percent; and the Company also noted that on rebuttal in this proceeding, AEP Ohio witness Avera testified that the Company’s cost of equity is in the range of 10.24 to 11.26 percent. (*See* AEP Ohio App. for Rehearing at 21-22.)

Another basis that the Company relied upon, both to support the reasonableness of the 10.5 percent ROE value that Mr. Allen recommended and to demonstrate that the 9 percent ROE value that the Opinion and Order used to establish the target RSR revenue is unreasonably low, is the fact that just 8 months earlier on December 14, 2011, in Case Nos. 11-351 and 11-352-EL-AIR, the Commission approved ROEs for the distribution businesses of AEP Ohio of 10.0 and 10.3 percent, respectively. (*Id.* at 21.) The 10.0 and 10.3 percent ROE values that the Commission approved for AEP Ohio’s distribution business (which are *less* risky than their generation business) were the values that the Commission approved in the distribution rate cases as reasonable. OCC/APJN have moved to strike this portion of AEP Ohio’s Application for Rehearing.

OCC/APJN's request should be denied. First, although AEP Ohio referred to the stipulation in the distribution rate cases in the course of describing how the Commission reached its decision in those cases, it did not actually rely upon that *stipulation* as precedent in the instant proceeding. Rather, it has relied upon the Commission's *Opinion and Order* in the distribution rate cases to demonstrate that the Commission very recently approved ROEs for AEP Ohio distribution businesses that are significantly higher than the 9 percent value that the Commission used to establish the RSR revenue target in this proceeding. Second, AEP Ohio has not attempted to use the distribution rate case stipulation to preclude or limit OCC/APJN (or any party) from advocating any position they might choose to advocate regarding any issue in this proceeding, including the appropriate ROE value used to determine the target RSR revenue target. Third, AEP Ohio has not cited the Commission's acceptance of the distribution rate cases stipulation (*i.e.*, the Commission's *Opinion and Order*), including the stipulated ROE values "so as to imply or state that any signatory party agrees with any specific provision of the [distribution rate cases] settlement." Instead, AEP Ohio has cited the Commission's *Opinion and Order* so as to demonstrate, in AEP Ohio's view, that the 9 percent ROE value used in connection with the RSR is too low.

AEP Ohio did not violate the terms or the spirit of the distribution rate case's stipulation when it referenced the Commission's *Opinion and Order* in that proceeding to support its position that the 9 percent ROE used to determine the RSR revenue target is unreasonably low and that the Commission should use, instead, the 10.5 percent ROE that AEP Ohio witness Allen recommended. OCC/APJN's arguments to the contrary, therefore, are misplaced, and their request to strike AEP Ohio's reference to the distribution rate case's stipulation should be denied.

**B. The Appropriate Method for Establishing a SEET Threshold ROE for AEP Ohio.**

In the course of modifying and approving a revised RSR for AEP Ohio, the Commission concluded that it would be appropriate to establish a significantly excessive earnings test (SEET) threshold, applicable for the term of the new ESP. August 8, 2012 Opinion and Order at 37. The Commission determined that the SEET threshold ROE should be 12 percent. *Id.* In its Application for Rehearing, at 32, AEP Ohio provided several reasons why a 12 percent ROE threshold for the SEET is unreasonably low, does not satisfy the requirements of R.C. 4928.143(F), and why the Commission should, instead, allow the annual SEET process to be conducted during the course of the new ESP using the Commission's established criteria and process. The Company observed, at page 33 of its Application for Rehearing, that the inadequacy of a 12 percent SEET threshold is evidenced, in part, by the treatment that Duke Energy Ohio (Duke) received in its ESP proceedings, including the ESP that covers the comparable period that AEP Ohio's new ESP covers. Specifically, AEP Ohio pointed out that in Case No. 08-920-EL-SSO and Case No. 11-3549-EL-SSO, the Commission approved for Duke a SEET threshold ROE of 15 percent. OCC/APJN have also moved to strike this portion of AEP Ohio's Application for Rehearing.

OCC/APJN's request should be rejected. First, as is the case with regard to the RSR target revenue ROE value and AEP Ohio's argument that relies upon the Commission's decision in the distribution rate cases, although AEP Ohio referred to the Duke stipulations in the course of describing how the Commission reached its decision in those cases, it did not actually rely upon those *stipulations* as precedent in the instant proceeding. Rather, it has relied upon the Commission's *Opinion and Orders* in the Duke ESP cases to show that the Commission very

recently approved a SEET threshold ROE for Duke that is significantly higher than the 12 percent value that the Commission established for AEP Ohio in this proceeding. Moreover, AEP Ohio was not a signatory party to the stipulations in the Duke ESP cases. Accordingly, whatever restrictions that the stipulation in those cases imposed on signatory parties to them, they would not apply to AEP Ohio.

In any event, AEP Ohio has not attempted to use the Duke stipulations to preclude or limit OCC/APJN (or any party) from advocating any position they might choose to advocate, now or in the future, regarding the appropriate SEET threshold ROE value for AEP Ohio during the term of its new ESP. Nor has AEP Ohio cited the Commission's acceptance of the Duke stipulation (*i.e.*, the Commission's Opinion and Order) in a manner that implies, let alone states, that any signatory party to that stipulation agrees with any specific provision of that settlement. Instead, AEP Ohio has cited the Commission's Opinion and Order in the Duke ESP cases to cite as a matter of undisputed fact that the Commission adopted 15% as a reasonable implementation of the SEET statute in the Duke case and to demonstrate, in AEP Ohio's view, that the 12 percent ROE value used in connection with the SEET threshold is unreasonably low.

**C. The Retention or Transfer of PCRBs by AEP Ohio and The Transfer of Generation Assets at Net Book Value, as Part of an Appropriate Corporate Separation Plan**

OCC/APJN's requests to strike a portion of the Company's Application for Rehearing requesting that the Commission modify its August 8, 2012 Opinion and Order dealing with pollution control revenue bonds ("PCRBs") (*see* AEP Ohio App. for Rehearing at 44), and a portion of the Company's Memorandum Contra other parties' Applications for Rehearing responding to an argument by IEU that the Company should be required to transfer its generation assets upon corporate separation at market book value rather than net book value (*see* AEP Ohio

Memo. Contra Applications for Rehearing at 77-78) should be denied for many of the reasons already discussed above.

First, as discussed above, AEP Ohio was not a signatory party to the Duke stipulations; therefore, AEP Ohio is not bound by any provision in those stipulations. Second, AEP Ohio has not attempted to use the Duke stipulations to preclude or limit OCC/APJN (or any party) from advocating any position they might choose to advocate, now or in the future, regarding the treatment of PCRBs or price at which to transfer generation assets upon corporate separation. Rather, AEP Ohio simply cited to the Commission's orders approving the corporate separation plans set forth in those stipulations to demonstrate how, in AEP Ohio's view, the August 8, 2012 Opinion and Order's treatment of those issues is inconsistent and inappropriate. As AEP Ohio explained in its Memorandum Contra Applications for Rehearing, it is in the public interest for the Commission to apply rules regarding corporate separation to similar facts in a consistent manner. Otherwise, the Commission's actions will create an unfair and unlevel playing field for competition in Ohio.

Moreover, as the Commission itself has correctly noted, the Commission is not bound by the provisions of stipulations in subsequent proceedings, and to the extent that the Commission finds the provisions of a stipulation to be applicable, reasonable, and just, the Commission is not prohibited from imposing similar provisions in this matter. *See* Case No. 11-5333-EL-UNC, Finding and Order at 15-16 (Jan. 23, 2012). Thus, to the extent the Commission agrees that it is not in the public interest to treat competitive issues disparately from one case to the next and decides to address AEP Ohio's concerns on rehearing regarding PCRBs and the price at which AEP Ohio's generation assets transfer upon corporate separation in its decision on rehearing, the Commission has the authority to do so.

**D. The Lawfulness of the RSR.**

OCC/APJN's request to strike the discussion in AEP Ohio's Memorandum Contra Application for Rehearing of the ESSC that the Commission approved as part of Duke's 2011 ESP case must also be denied. As OCC/APJN point out, the Company referred to Duke's ESSC to rebut intervenors' arguments that the RSR is unlawful. Leaving aside the fact, again, that AEP Ohio was not a signatory party to Duke's 2011 ESP stipulation and thus is not bound by the terms of that stipulation, AEP Ohio's reference to the ESSC is completely appropriate.

AEP Ohio did not cite the ESSC, which was adopted as part of Duke's stipulation, for the proposition that that stipulation is binding on the parties or the Commission as a precedent; rather, the Commission's adoption of that stipulation proves that its result – including its adoption of the ESSC – was not unlawful and did not violate any important regulatory principle or practice. It is appropriate to rely on an Order adopting a stipulation to establish either that a provision that was adopted through a stipulation is lawful or does not violate regulatory policy, given that the three-part test applicable to stipulations would necessarily prevent adoption of an unlawful provision or a provision that violates an important regulatory principle or practice. In other words, a decision adopting a contested stipulation is precedent for application of the three-part test to the provisions in the pertinent stipulation. Because AEP Ohio's discussion of a charge similar to the RSR that was approved in Duke's 2011 ESP proceeding was a proper citation to precedent that rebuts the argument that the RSR is unlawful, the Commission should deny OCC/APJN's request that that discussion be stricken.

## **CONCLUSION**

For the reasons set forth above, AEP Ohio requests that the Commission deny OCC/APJN's motion to strike in its entirety.

Respectfully submitted,

//s/ Steven T. Nourse

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**On behalf of Ohio Power Company**

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by electronic mail upon counsel for all other parties of record in this case on this 3rd day of October, 2012.

//s/ Steven T. Nourse

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Summary: Memorandum Contra electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company